

No. 75-1813

Supreme Court, U. S.

FILED

JUN 14 1976

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

NICHOLAS CIVELLA, ANTHONY THOMAS CIVELLA,  
AND FRANK ANTHONY TOUSA,  
*Petitioners,*

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

EDWARD P. MORGAN

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(i)

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**SUPPLEMENTAL APPENDIX**

**IN THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

**UNITED STATES OF AMERICA,**  
*Plaintiff,*

v.

Criminal Action  
No. 23562-3

**NICHOLAS CIVELLA, et al.,**  
*Defendants.*

**MEMORANDUM ON DENIAL OF MOTIONS,  
AMENDED MOTIONS, AND SUPPLE-  
MENTAL MOTIONS TO SUPPRESS INTER-  
CEPTED WIRE COMMUNICATIONS AND  
TAPE OF PEN REGISTER AND OTHER  
MOTIONS**

Repeatedly in timely filed written original motions, supplemental and amended motions (filed with leave of Court) in which all defendants were granted leave to join, the defendants have repeatedly sought to suppress recorded communications intercepted by a Court authorized wiretap and the tape of an authorized pen register surveillance. (Untimely motions and suggestions for hearings filed without leave after the setting of the last of the adjourned plenary evidentiary hearings have been denied for untimeliness as well as lack of merit. For example, see the "Motion for an Order Setting an Evidentiary Hearing of Defendant Anthony Civella" filed March 7, 1975, over three years after this action was commenced and after

numerous trial settings and many plenary pretrial evidentiary hearings.)

The first consolidated motion of all defendants, which was filed on November 29, 1975, sought suppression of the results of a Court authorized wiretap beginning on January 8, 1970, and continuing until and including January 17, 1970. The telephone facilities that were the subject of the electronic surveillance were located at 1048 East Fifth Street, Kansas City, Missouri. These premises were occupied by defendant Tousa.

This original motion by all defendants charged that the judicial authorization for the wiretap under Section 2518, Title 18, United States Code, failed to comply with Section 2518 in the following respects:

- (a) The application for the order of authorization made by David H. Martin failed to comply with subparagraph (1)(b) of Section 2518 in that it does not contain a full and complete statement of the facts relied on by the applicant to justify his belief that an order should be issued except to incorporate an affidavit of Special Agent Helleckson "Which was not filed with the application or presented to the Court."
- (b) The application does not contain a full and complete statement whether other investigative procedures had been tried and had failed, or were reasonably apparent to succeed if tried or were too dangerous, thereby violating the Fourth Amendment to the Constitution of the United States.
- (c) No factual showing of probable cause was made to support the Court's determination of probable cause.
- (d) The letter of authorization (assumed then to be from Will Wilson) covers only offenses in violation of Sections 1084 and 1952, Title 18, United States Code, by defendant Tousa, and not a crime of conspiracy

under Section 1371, Title 18, United States Code, and the authorization is therefore void.

- (e) None of the defendants were served with an inventory as required by Section 2518, Title 18, United States Code.
- (f) The execution of the authorization exceeded the order of authorization and the underlying statutory authority of Sections 2510 *et seq.*, Title 18, United States Code, because while the order authorized the interruption of wire communications of Frank Tousa from the telephone facilities at 1048 East Fifth Street (1) calls to Tousa and from other persons were intercepted, (2) report of the interception was not timely made, and (3) the interception did not cause an attainment of its objective.
- (g) Counsel for the Government made unauthorized disclosures of the intercepted tapes to prospective witness Alvin Hurst.
- (h) The order of authorization and Section 2501 *et seq.* of Title 18, United States Code, as amended in 1968, is unconstitutional for many reasons.
- (i) The use of a pen register was illegal because (1) there was no authorization for an application therefor, and (2) it was unlawful on many grounds, including violation of the Fourth Amendment to the Constitution of the United States.

Since the filing of the original consolidated motion, several waves of discovery exposed the full factual background as the exploratory and conflicting jurisprudence finally reached resolution by the Supreme Court of the United States in *United States v. Giordano*, \_\_\_ U.S. \_\_\_, 94 S.Ct. \_\_\_, 40 L.Ed.2d 341 (1974), and *United States v. Chavez*, \_\_\_ U.S. \_\_\_, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974). The latest timely pretrial consolidated sup-



plemental and amended motions of all defendants were filed, with leave of Court, on May 20, 1974. As a result of the supplemental and amended motions several additional and varying factual and legal contentions were advanced and considered. None of the original and additional factual and legal contentions have support in the evidence or the law.

After May 20, 1974, additional suggestions and discovery motions and requests of defendants were received and granted in an effort to grant to the defendants the most liberal discovery legally possible under the circumstances. In the meantime, many trial settings were made and postponed because of the requests of the defendants for further discovery and more pretrial evidentiary hearings, as disclosed quickly by the voluminous Criminal Docket sheet entries in this action.

The pretrial discovery orders and evidentiary hearings in this action ultimately granted to the defendants the maximum discovery requested in timely motions for leave to file which the times of which were liberally extended over a period of more than three years. In no reported case have equally liberal opportunities for timely pretrial discovery been granted to defendants in a similar action. Counsel for the defendants have used every discovery opportunity to the fullest except (a) the twice offered opportunity to depose former United States Attorney General John N. Mitchell, and (b) the final opportunity for examination, by experts chosen by defendants, of the disputed handwriting and genuine exemplars of the handwriting of John N. Mitchell. At the final adjourned pretrial evidentiary hearing fixed for final offer of pretrial evidence on the issue of the genuineness of the initials "J.N.M." on the authorization for the wiretap application, the defendants stated that they had no further evidence to offer, although ample opportunities for examination of the materials in evidence was twice available.

The legal and evidentiary bases of the defendants' timely asserted grounds for suppression of the evidence secured by electronic surveillance has been fully explored.

As the extended and adjourned plenary pretrial evidentiary hearings came to a close, it was apparent that the evidence, regardless of the incidence and degree of the burdens of proof and burdens of going forward with the evidence, did not support the timely filed motions and supplemental and amended motions of the defendants to suppress the evidence secured by the challenged electronic surveillance and that all the motions to suppress should be denied. Therefore, the order of denial thereof was entered and this action was set for trial on May 5, 1975, at Springfield, Missouri, before the Honorable William R. Collinson of this Court.

The evidence proved beyond reasonable doubt that John N. Mitchell, when Attorney General of the United States, personally authorized the application for the challenged electronic surveillance, despite earlier assumptions attributable to the Government that Will Wilson did so.

The evidence further proved, convincingly and beyond doubt, that the reference to the "affidavit" of "Special Agent Helleckson" in the application submitted to Judge Collinson was an obvious clerical error, referring to a draft of a proposed affidavit of Agent Helleckson rejected in the administrative review of the sufficiency of the original drafts of papers found undesirable. In a criminal action, a judicial record containing such an error is correctable at any time under Rule 36 of the Federal Rules of Criminal Procedure. That the clerical error did not substantially affect the sufficiency of the application, nor the judicial action thereon, is clearly proven by the evidence and supported by the controlling authorities. *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1489, 40 L.Ed.2d 380; *United States v. Brick* (C.A.8) 502 F.2d 219.

The conclusion that the motions and supplemental and amended motions to suppress should be denied on the grounds asserted under the controlling jurisprudence is now fully apparent. See among other controlling authorities cited in the briefs, the leading cases *United States v. Gior-dano, supra*; *United States v. Chavez, supra*; *United States v. Brick, supra*.

After three years of discovery and protracted evidentiary hearings during which the defendants were given every opportunity to discover and offer evidence in pretrial hearings on motions one of the counsel for defendant Anthony Civella, without leave of Court, filed dilatory untimely motions to secure *de novo* evidentiary hearings previously available for many months but not requested. Counsel went to the extreme of issuing and causing to be served subpoenas *duces tecum* on government personnel returnable when no hearing was set and hearings were closed by formal orders made in open court. These untimely motions, apparently designed to abort the last setting for trial and to reopen pretrial proceedings concluded after years of effort were terminated by orders of Court.

With respect to the motions for dismissal of the indictment because of the lack of authority of the special "Strike Force" attorneys of the Kansas City Field Office to appear before the Grand Jury, the motions have been denied without prejudice to reopen the matter if and when the Court of Appeals has ruled on the question raised by conflicting decisions of Divisions Nos. 1 and 4 of this Court. Further, regardless of the manner of resolution of that conflict, the authority of the special attorneys in case may be established by the specific terms of the authorizations applicable to cases of this character.

Kansas City, Missouri  
Date: 4-28-75

/s/ William H. Becker  
William H. Becker  
Chief Judge